IN THE

Supreme Court of the United States

October Term, 1977

No. 77-495

MANFRED SWAROVSKI,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONER, IN FURTHER SUPPORT OF THE PETITION

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TABLE OF CONTENTS

	PAGE
Argument	2
Conclusion	10

TABLE OF CASES

American Foreign S.S. Co. v. Matise, 423 U.S. 150	2
Brown v. Illinois, 422 U.S. 590, 45 L.Ed.2d 416 (1975)	4
Chu, In the Matter of, 42 N.Y.2d 490, decided October 13, 1977	5
G.M. Leasing Corp. v. United States, 429 U.S. 338, 50 L.Ed.2d 530 (1977)	8
United States v. Stanley, 545 F.2d 661 (9th Cir. 1976)	7
United States v. Watson, 423 U.S. 411, 46 L.Ed.2d 598 (1976)	6
Wong Sun v. United States, 371 U.S. 471, 9 L.Ed.2d 441 (1963)	4

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On September 30, 1977, the Petitioner filed his petition for a writ of certiorari with this Court. Thereafter, the time of the Government to oppose that petition was extended (upon the motion of the Government) to December 14, 1977. Apparently, on or about January 16, 1978 the Government filed its brief opposing the grant of certiorari, the said opposing brief having been received by Petitioner's counsel by mail on January 17, 1978.

ARGUMENT

1. The Government, in opposing the petition, urges:

> "Petitioner's arguments are premature. . . . [I]f [petitioner] should be convicted and his conviction should be affirmed, he would be able to present all of his arguments—those concerning suppression as well as any others that arise out of the trial—to this Court in a petition for certiorari seeking review of the final judgment. *American Foreign S.S. Co.* v. *Matise,* 423 U.S. 150, 155. There is no reason for piecemeal review of petitioner's contentions . . . ." (p. 4, Gov't. br.)

But, respectfully the authority the Government cites—*American Foreign S.S. Co.* v. *Matise*—a civil case, appears to have little or no relevance to the proposition for which it is cited.

Indeed, as noted by the first of the "Questions Presented" in the petition (petition, p. 2), and in the discussion thereafter (petition, pp. 10-12), a prime reason for favorable action by this Court on the petition is that the instant case ideally poses for the Supreme Court the opportunity to limn the scope and impact of an interlocutory appeal, by the Government, from suppression action. That is now a largely uncharted area. And there may be *res judicata* and other shoals upon which an unwary defendant may founder. (See the open questions suggested in the petition, at pp. 10-11.)

It is now unclear, for example, whether a defendant's failure to urge (on the Government's appeal) alternate grounds for suppression—grounds supported by the hearing record—will bar him from later raising those issues (see petition, footnote at p. 11).

Interestingly, although the Government here and now, in this high Court, argues against "piecemeal review" (Gov't. br., p. 5), its present position in this regard is diametrically opposed to the position it took before the Court of Appeals for the Second Circuit. There it urged (and the Second Circuit accepted its urging) that the only issue before the reviewing tribunal was the purported unlawfulness of the arrest by Customs agents, and that no other grounds that might support the suppression order below were to be considered. This "piecemeal appeal" question, and the scope of review by the courts of appeals once the Government has appealed a suppression order, can only be finally settled here. The Swarovski case aptly presents it for resolution.

2. The Government, in opposing Supreme Court review, urges that even if the April 2, 1975 arrest of Mr. Swarovski was an unlawful one, the exclusionary rule should not have been applied (Gov't. br., p. 5). In support of this contention, the Government suggests that all that is involved, when federal agents make an arrest without any authority to do so, and then seek to have it justified as a citizen's arrest, is a possible violation of a state statute.

We respectfully submit that the Government misconstrues that which took place in both the district court and the circuit court, and that which is presented to this Court by the petition. Both courts below agreed that the federal Customs agents lacked authority from Congress to make the Swarovski arrest, an arrest involving neither the revenue nor the narcotics laws. (In those two areas only, Con-

gress had authorized Customs agents to make arrests without warrants but upon probable cause.) Having agreed upon this proposition, the district court and the circuit court each turned to New York State's citizens' arrest statute to see whether the arrest might nevertheless be saved as such a citizens' arrest. Although the district court had held that it could not be (and the circuit court reversed this ruling), the district court was not weighing a violation of state law—as the Government now contends (Gov't. br., p. 5, at note 4)—but was questioning whether this particular federal arrest, otherwise unlawful, might be salvaged under state law. It has long been clear, under *Wong Sun* v. *United States,* 371 U.S. 471, 9 L.Ed.2d 441 (1963), reaffirmed in *Brown* v. *Illinois,* 422 U.S. 590, 45 L.Ed.2d 416 (1975), that the fruit of an illegal arrest must be suppressed. And the Government's attempted distortion of what happened here, transmuting it into a simple "violation of a state statute" by United States Customs agents, should not be permitted to obscure and vitiate constitutional principles. If the district court were correct, the Customs agents arrested Manfred Swarovski in violation of his Fourth Amendment right against an unlawful seizure of his person. The issue of the constitutionality of the arrest, and the propriety of suppression if the arrest was an unauthorized one, cannot be avoided by the Government's twisted use of terminology.

3. The Government also tries to reduce the instant petition to one merely involving an interpretation of state law (Gov't. br., pp. 5-6). In this treatment, the Government errs in two regards.

First, it errs in urging that the federal court of appeals' decision, that the term "felony" as used in New York State's citizens' arrest law, correctly referred to federal as well as state felonies (Gov't. br., pp. 5-6). This conclusion by the Government (and the court of appeals) is contravened by the line of cases urged in petition (at p. 14). Moreover, the very recent case of *In the Matter of Chu,* 42 N.Y.2d 490, decided October 13, 1977—after the instant petition for a writ of certiorari was filed—by New York State's highest court, underscores that when New York's statutes use the word "felony" they do not invariably mean federal as well as state felonies. Dealing with a disbarment situation,* New York State's highest court's majority noted:

> ". . . [W]e now perceive little or no reason for distinguishing between conviction of a Federal felony and conviction of a New York State felony as a predicate for professional discipline. *Certainly is this so when, as here, there is a New York State felony and substantially the same elements . . . .*
>
> "Additionally in the present instance there is a very close, if not a precise, parallelism between the conduct proscribed by Section 1001 [the federal statute] and that proscribed by Section 175.35 [the state statute] . . . . The core of the offense under both statutes is the wilfull filing in a governmental office of a false statement knowing it to be false. In the present case we hold that such matching suffices." See 42 N.Y.2d at 94. (emphasis supplied)

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* Respectfully, we submit that there are more compelling reasons to use the term "felony" quite broadly when considering disbarment, than when considering how broad should be the authority of citizens to arrest other citizens.

That the term "felony" as used in New York State law, does not embrace federal felonies *unless* they have parallels in the state law was further underscored by the three state high court concurring judges. Starting their brief concurrence, they said:

> "We agree with the majority that the parallels between the elements of the Federal felonies in issue in this case are so similar to their New York State analogues that automatic disbarment is an appropriate result under our Judiciary Law. But in so doing, we assume that the majority did not intend to imply that all felony convictions in Federal courts would necessarily dictate the same result." See 42 N.Y.2d at 495.

Second, we recognize (with the Government) that ordinarily this Court should not review that which is, at most, a question of State law. But, as urged in the petition (pages 12-17), the instant misinterpretation is of a citizens' arrest statute with counterparts in the laws of many states —*which misinterpretation viliates a congressionally imposed limitation upon United States Customs agents*—and so the matter before this Court is *not* "at most, a question of state law" (Gov't. br., p. 6). It is appropriate for this Court to consider whether a typical state citizens' arrest statute is to be subjected to so strained an interpretation that it will emasculate, through much of the United States, a congressional limitation upon the arrest authority of federal agents, a limitation which this Court had recently underscored in *United States* v. *Watson,* 423 U.S. 411, 416, 46 L.Ed.2d 598, 604-05 (1976).

4. Lastly, we note that the Government's brief seems to seek to mislead this high Court in several other respects.

(a) Although the Government's brief had earlier (p. 3) noted that Mr. Swarovski—when initially apprehended by the Customs agents—promptly responded to the first questions placed to him, the Government (br., p. 6) conjures up a gulf of time between the J.F.K. Airport searches of Mr. Swarovski's luggage and his interrogation. Shortly after Customs Agent Fish had covertly searched Mr. Swarovski's checked luggage, in the Pan Am checked baggage area, the Petitioner was stopped by Customs agents, deprived of his boarding pass, passport and baggage checks, and immediately questioned concerning items that he might have had with him. Clearly, the Government intends to use this interrogation upon trial. Immediately thereafter, Mr. Swarovski was confronted with the baggage that the agent had previously searched, and when a fresh "search" in Mr. Swarovski's presence (not unexpectedly) yielded the camera, he was *immediately* questioned further. That further questioning, that started in the J.F.K. terminal, continued into the evening at the nearby United States Customs Service office. Respectfully, under *Brown* v. *Illinois,* 422 U.S. 590, 45 L.Ed.2d 416 (1975), there can be no doubt that such questioning was the fruit of the searches.

(b) The Government suggests that the "border search" authority is clearly applicable to export searches (Gov't. br., p. 7, first paragraph of n.8). Although the ninth circuit did suggest that, under the circumstances presented in *United States* v. *Stanley,* 545 F.2d 661 (9th Cir. 1976), it might properly so apply, this Court has never so ruled. Indeed, if it is now the Government's position that the "border search" exception—that deviates from general Fourth Amendment protections—should apply generally to

export situations* it is appropriate that a ruling of such breadth be made by this Court, and not simply accepted as "the law" because for the moment the Government finds it tactically sound to so urge.

(c) The Government also suggests that "exigent circumstances" justified the search of Mr. Swarovski's luggage. As the Government was aware of Mr. Swarovski's intention to leave the United States with the camera for at least some days before he was arrested (Gov't. br., pp. 2-3), and yet the Government never sought a search warrant, we cannot comprehend the Government's present "exigent circumstances" claim. Chief Justice Burger, concurring recently in *G.M. Leasing Corp.* v. *United States,* 429 U.S. 338, 50 L.Ed.2d 530 (1977), noted that when "agents *delay* after observing . . . highly suspicious events" the "exigent circumstances" exception to the search warrant requirement is unavailable to them.

(d) Lastly, without the entire suppression hearing record before this Court at this time, the Solicitor General's brief sugggests that Agent Fish's search had not been "kept secret" from the Assistant United States Attorney (Gov't. br., last paragraph of footnote, p. 8). At the suppression hearing, conducted in October 1976, although Agent Fish stated that he had searched the Swarovski baggage in the Pan Am baggage area shortly before Mr. Swarovski's arrest, and stated he had so informed other Customs agents, his immediate superior (as of April 1975 at J.F.K.) denied having been so informed, as did their other col-

* Obviously, ordinarily import situations, in which daily large scale enforcement of the revenue laws are involved, and export situations, in which ordinarily there is no need for monitoring, are generally quite different.

leagues; the United States Attorney, in colloquy, indicated that he learned of the search from the agent that morning (in October 1976), although the search had been made in April 1975. Therefore, the Fish search had apparently either been "kept secret" for a year and a half, as the petition states, or there was a fair amount of unexplained dishonesty on the part of the United States Customs agents who participated in the suppression hearing.

What is here relevant is that whether or not the Fish search was furtive, or otherwise unlawful, was not *considered* by the court of appeals, which had ruled that all "arguments . . . concerning the legality of the [luggage] search . . . are not independent grounds supporting the district court's suppression . . . ." The petition suggests that the instant case presents this Court with the opportunity of informing those concerned with federal criminal justice in America just what must be considered by our United States courts of appeal when the Government appeals from an adverse suppression determination.

This reply brief has sought to dispel some of the misconceptions that may have been introduced through the Government's opposition to the grant of the petition. So doing, we hope we have not so focused upon the "trees" as to cause sight of the "forest" to have been lost.

Essentially, the instant case, in its present posture, is ideally suited for the Supreme Court to provide guidance concerning the scope and impact of an appeal by the Government from a suppression order. This Swarovski case also presents an opportunity for this Court to rule whether

state citizens' arrest provisions, found so commonly in American law, are to be so strained as to confer upon federal agents arrest authority that the Congress has seen fit to deny them.

Conclusion

For all the reasons urged in the petition, and further considered in this brief, we respectfully submit that Manfred Swarovski's petition for a writ of certiorari should be granted.

Respectfully submitted,

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